

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION, IN ADMIRALTY

Case No. 07-10027-CIV-KING

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	CONSENT DECREE
v.)	
)	
HECTOR LOSADA, <i>in personam</i>)	
and the ANDROW)	
VIN FL 1759KK, <i>in rem</i> ,)	
)	
Defendants.)	

This Consent Decree is entered into between the United States, on behalf of the Secretary of the United States Department of Commerce and the National Oceanic and Atmospheric Administration ("NOAA"), and Defendants Hector Losada and the ANDROW.

INTRODUCTION

A. Plaintiff United States filed a Complaint against Defendants under the National Marine Sanctuaries Act ("NMSA"), 16 U.S.C. §§ 1431, *et seq.*, seeking Damages and Response Costs for Defendants' destruction of natural resources in the Florida Keys National Marine Sanctuary (the "Sanctuary"). In pursuing this claim, NOAA is acting in its capacity as a trustee for resources within the Sanctuary, pursuant to 40 C.F.R. § 300.600(b)(1) and Department of Commerce Organization Order 25-6.

B. On March 14, 2003, Defendant Hector Losada ran his 34-foot commercial vessel the "ANDROW" aground in the southwest corner of the Marquesas in the Sanctuary. This grounding caused extensive injury to important sea grass beds at the Site. The site of the March 14, 2003 grounding incident is hereinafter called the "Site."

C. NOAA investigated the grounding Incident and conducted a damage assessment of the Site. The costs of these activities are both "Response Costs" and "Damages" within the meaning of the NMSA. 16 U.S.C. §§ 1432(7) & 1432(6)(A)(i)(I).

E. Defendants do not admit liability to Pl. intiff arising out of the transactions or occurrences alleged in the Complaint, and do not admit any of the allegations of the Complaint.

F. The United States has reviewed the financial information submitted by Defendants and has determined that Defendants are unable to pay the total amount of Damages and Response Costs sought by the United States under the Complaint. This settlement is based on the Defendants' limited ability to pay.

G. This settlement is made in good faith after arm's-length negotiations. The United States and Defendants agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter and entry of this Decree will avoid litigation between the Parties, is the most appropriate means to resolve the matters covered herein, and is fair, reasonable and in the public interest.

NOW, THEREFORE, with the consent of the Parties to this Decree, it is hereby ORDERED, ADJUDGED AND DECREED:

JURISDICTION

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (Federal question) and 1345 (United States as plaintiff), 16 U.S.C. §§ 1437(j) (NMSA Enforcement: Injunctive Relief) and 1443(c)(2) (NMSA Civil Actions: Venue).

BINDING EFFECT

2. This Consent Decree applies to and is binding upon the United States and upon Defendants and their heirs and assigns.

DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree, including Response Costs and Damages, shall have the meanings ascribed to them in the NMSA, 16 U.S.C. §§ 1431, et seq. The following definitions also apply to terms used in this Consent Decree:

- a. "Date of Lodging of this Decree" shall mean the date that this Decree is lodged, or a copy of it is filed, with the Court.
- b. "Date of Entry of this Decree" shall mean the date that this Decree is entered by the Court.
- c. "NMSA" shall mean the National Marine Sanctuaries Act, 16 U.S.C. §§ 1431, et seq.
- d. The "Site" shall mean the location of the March 14, 2003 incident in which Defendant Losada ran the ANDROW aground in the southwest corner of the Marquesas in the Sanctuary.

PAYMENT

4. Within 30 days of the Date of Entry of this Consent Decree, Losada shall pay the sum of \$5000 for Response Costs and Damages. Payment shall be made by check payable to the Financial Litigation Unit of the United States Attorney's Office for the Southern District of Florida, in accordance with instructions to be provided, referencing DOJ case number 90-5-1-1-09107, and the title and civil action number of this case. A transmittal letter indicating that the EFT has occurred shall be sent to the Parties in accordance with the paragraph below entitled "Notices and Submissions."

COMPLIANCE PROGRAM

5. For a period of five years from the Date of Entry of this Decree, Defendants shall not operate a vessel within or engage in or participate in any commercial or recreational fishery within the boundaries of the Sanctuary, as defined by 15 C.F.R. § 922.161 and Appendix I to 15 C.F.R. Part 922 Subpart P. This includes but is not limited to the harvest or sale of any fish, lobster or shellfish pursuant to any state or federal permits or licenses, or Florida salt water products license and includes working under another person's state or federal permits or licenses as a crew member within the boundaries of the Sanctuary. Nothing in this paragraph prevents Defendants from holding or applying for state or federal permits or licenses pertaining to commercial or recreational fisheries, or fishing outside the Sanctuary.

CERTIFICATION

6. Losada hereby certifies that, to the best of his knowledge and belief, after thorough inquiry, he has submitted to the United States financial information that fairly, accurately, and materially sets forth his financial circumstances, and that those circumstances have not materially changed between the time the financial information was submitted and the time the Defendant executes this Consent Decree. The United States expressly conditions its consent to this Decree on the accuracy of the foregoing representations by Defendants, and upon the limitations on Defendants' ability to pay the full amount of Response Costs and Damages sought in the Complaint.

STIPULATED PENALTIES/DEFAULT

7. Defendants shall pay a stipulated penalty of \$500 per day for each failure to timely make a payment under Paragraph 4, or comply with any term of the Compliance Program required by Paragraph 5 of this Consent Decree. Penalties for late payment shall begin to accrue

on the day after payment is due and shall continue to accrue through the date of payment. All other Stipulated Penalties begin to accrue on the day that a violation of the Consent Decree occurs, and continue to accrue through the final day of the correction of the non-compliance.

8. In the event that a Defendant fails to timely pay any amount specified in Paragraph 4, it shall pay Interest on any balance due. Interest shall accrue on any unpaid amount from and including the Date of Lodging of the Consent Decree, until and including the day full payment of penalty and Interest is received by the United States. Interest shall be calculated in accordance with 28 U.S.C. § 1961. Payment of Interest due shall be made in the manner directed by the United States, and are in addition to any stipulated penalties.

9. The payment of a stipulated penalty shall not affect a Defendant's obligation to satisfy the requirements of this Consent Decree, except for the obligation to pay the stipulated penalty.

10. Stipulated Penalties are due and payable within 30 days of the date of demand for payment by the United States, and shall be paid in the manner instructed by the United States. If a Defendant fails to pay Stipulated Penalties when due, Interest shall continue to accrue on the unpaid balance to the date of payment. In addition, the United States may institute proceedings to collect the penalties, as well as any Interest associated thereto.

11. Defendants shall be liable for attorney's fee and costs incurred by the United States associated with the collection of Stipulated Penalties or any other amounts due under this Consent Decree.

12. If a Defendant fails to timely make any payment under this Decree, or to take any action specified in this Consent Decree, this Consent Decree shall be considered an enforceable judgment against that Defendant for purposes of post-judgment collection under Federal Rule 69,

Federal Rules of Civil Procedure, and other applicable statutory authority without further order of this Court.

13. Nothing contained in this Consent Decree shall be construed to prevent or limit the rights of the United States to seek or obtain any other remedy, sanction or relief that may be available by virtue of Defendants' failure to comply with this Consent Decree, the NMSA, or any other applicable law or regulation.

EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

14. In consideration of the compensation provided by Defendants in accordance with this Consent Decree and the actions required under this Consent Decree, and except as specifically provided in the following Paragraph, the United States covenants not to sue or to take any other civil or administrative action against Defendants under the NMSA to recover Response Costs or Damages related to the Site. These covenants not to sue are not effective until, and are conditioned upon, complete and satisfactory performance by each Defendant of his obligations under this Consent Decree, including Paragraph 5. This covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to the United States by Defendants. If the Financial Information is subsequently determined by the United States to be false or, in any material respect, inaccurate, Defendants shall forfeit all payments made pursuant to this Agreement and the covenant not to sue shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose the United States' right to pursue any other causes of action arising from Defendants' or materially inaccurate information. This covenant not to sue extends only to Defendants and does not extend to any other person.

15. Plaintiff reserves, and this Consent Decree is without prejudice to, all rights of the

United States against Defendants with respect to all matters other than those expressly specified in the preceding Paragraph.

16. Defendants hereby covenant not to sue and agree not to assert any claims or causes of action, including but not limited to claims under the Constitution of the United States of America, against the Plaintiff, its employees, agents, experts, or contractors, with respect to the Site and with respect to the allegations contained in the Complaint.

NOTICES AND SUBMISSIONS

17. Any notices or correspondence required to implement this Consent Decree shall be in writing and shall be deemed to have been made when sent by certified mail or its equivalent, including overnight courier, to the persons specified below. Notices or correspondence shall refer to DJ No. 90-5-1-1-09107 and the title and civil action number of this case, and shall be sent to:

As to the United States:

United States Department of Justice
Chief, Environment and Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20005

and

Stephanie Willis
Senior Attorney
Office of General Counsel
National Oceanic & Atmospheric Administration
263 13th Avenue South, Suite 177
St. Petersburg, FL 33701
(727) 824-5362

As to Mr. Losada:

Carlos A. Mesa
Mesa & Pereira, P.A.
9000 SW 152nd Street, Suite 106
Palmetto Bay, FL 33157
cmesa@mesapereira.com.

RETENTION OF JURISDICTION

18. The Court shall retain jurisdiction over both the subject matter of, and the Parties to, this action for the purposes of enforcing the Parties' rights and obligations under this Consent Decree until such time as Defendants have fulfilled all obligations under this Consent Decree.

SIGNATORIES

19. Each undersigned representative certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document. This Consent Decree may be signed in counterparts, and such counterpart signature pages shall be given full force and effect.

PUBLIC COMMENT

20. This Consent Decree shall be subject to a public comment period of not less than 30 days pursuant 28 C.F.R. § 50.7. The United States may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper, or inadequate.

ENTIRE AGREEMENT

21. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Consent Decree and supersedes all prior agreements and understandings, whether oral or written. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes

any part of this Consent Decree or the settlement it represents, nor shall it be used in construing the terms of this Consent Decree.

FINAL JUDGMENT

22. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the United States and Defendants.

So Ordered.


DATED: _____

JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

WE HEREBY CONSENT to the entry of the Consent Decree in United States v. Losada, et al.:

FOR THE UNITED STATES OF AMERICA:

Dated:



Ellen M. Mahan
Deputy Chief
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice

Dated:

11/28/07

Steven O'Rourke
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
P. O. Box 7611
Washington, D.C. 20044-7611
(202) 514-9000
(202) 514-8395 (fax)
Steve.o'rourke@usdoj.gov

We HEREBY CONSENT to the entry of the Consent Decree in United States v. Losada et al.:

FOR DEFENDANTS:

Dated: 11/20/07

Hector Losada
9780 SW 62 Street
Miami, Florida 33173
(305) 303-4442

Dated: 11/20/07

~~Carlos~~ A. Mesa
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